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October 20, 2004

Marlene H. Dortch
Office of the Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D. C. 20554

Re: Florida Cable Telecommunications Ass'n, Inc., et al. v. Gulf Power Co.; EB Docket No. 04-381

Dear Ms. Dortch:

Enclosed for filing in the above proceeding please find the original and six (6) copies, of *Petition for Clarification.*

Also enclosed is a **"Stamp and Return"** copy of this filing which we ask be stamped with the FCC's date of filing and then returned to our messenger.

Thank you for your assistance.

Sincerely,

Geoffrey C. Cook

Enclosures

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Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FLORIDA CABLE TELECOMMUNICATIONS ASSOCIATION, INC., COX COMMUNICATIONS GULF COAST, L.L.C., *et. al.* *Complainants,* v. GULF POWER COMPANY, *Respondent.*	E.B. Docket No. 04-381

To: Office of the Secretary

Attn.: The Honorable Richard L. Sippel
Chief Administrative Law Judge

PETITION FOR CLARIFICATION

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PETITION FOR CLARIFICATION

The Florida Cable Telecommunications Association, Inc., Cox Communications Gulf Coast, L.L.C., Comcast Cablevision of Panama City, Inc., Mediacom Southeast, L.L.C., and Bright House Networks, L.L.C. ("Complainants"), by undersigned counsel, respectfully submit this Petition for Clarification of the *Prehearing Order*[1] and seek clarification of the scope of the designated evidentiary hearing in the above-captioned proceeding.

[1] *Florida Cable Telecommunications Association, Inc., et al. v. Gulf Power Co.*, Prehearing Order, FCC 04M-28, EB Docket No. 04-381 (rel. Oct. 1, 2004) (hereinafter "*Prehearing Order*"). On October 15, 2004, pursuant to the Order released September 30, 2004 and Commission rules, Complainants filed their Notice of Appearance as well as an Unopposed Joint Motion to Continue Initial Procedural Deadlines (with Respondent Gulf Power) seeking an extension of 30 days on the procedural dates established in the *Prehearing Order*.

I. INTRODUCTION AND SUMMARY

The Enforcement Bureau ("Bureau") designated a hearing[2] to permit Gulf Power to present evidence of full capacity on its poles as well as an appropriate measure for setting pole rates above marginal costs for attachments on any particular pole that is at full capacity, based on the decision in *Alabama Power Co. v. FCC*.[3] The Bureau's *Hearing Designation Order* requires a two-part evidentiary hearing. First, before Gulf Power may seek more than marginal cost for any cable operator's attachment to any Gulf Power pole, Gulf Power must show *for each such pole*: full pole capacity, combined with either (a) another attacher seeking pole space, or (b) the existence of a higher-valued use of the space through the utility's own operations. Second, only after Gulf Power has made such a showing for any individual pole could Gulf Power then submit evidence to prove its entitlement to compensation for an attachment on that pole that is above the "marginal costs" of permitting such attachment. Any proffer of evidence must necessarily recognize that cable operators' payment of make-ready expenses and annual rent under Section 224(d) and the FCC's regulations ("Cable Formula") already *exceeds* the marginal costs of permitting attachments to a significant degree.

In order to determine whether particular poles are at "full capacity," and to be sure that the evidence comports with the standard in the *Hearing Designation Order*, these issues will need to be addressed: (1) a definition and interpretation of the ambiguous statutory term "insufficient capacity" and its parameters; (2) application of precedent determining that "insufficient capacity" exists only "when it is agreed" by the parties; (3) a definition and comparison of the terms "full capacity" and "crowding" on poles; (4) application of the

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[2] *Florida Cable Telecommunications Ass'n, Inc., et al. v. Gulf Power Co.*, Hearing Designation Order, EB Docket No. 04-381, DA 04-3048 (rel. Sept. 27, 2004) (hereinafter "*Hearing Designation Order*").

[3] 311 F.3d 1357, 1370-71 (11th Cir. 2002), *cert. denied*, 124 S. Ct. 50 (2003) (hereinafter "*Alabama Power v. FCC*").

Commission's requirement for a reasonable and specific bona fide development plan for any reservation of space on any particular pole by Gulf Power; (5) a determination of the relevance of prior voluntary and contractual pole change-outs performed by Gulf Power; and (6) a finding of the extent to which the Cable Formula already provides Gulf Power with adequate compensation in excess of marginal costs. These issues must be addressed and resolved in any evidentiary hearing before it can be determined whether specific poles are presently operating at "full capacity," and the *Alabama Power v. FCC* exception allowing compensation above marginal costs is to be applied to any pole. Complainants also seek this clarification because the "Burden of Proof" provision in the October 1st Order appears to contemplate an "alternative cost methodology" to the exclusion of the "Cable Formula," rather than consideration of entitlement to simply more than marginal costs on specific poles, which the Cable Formula does provide.

Finally, Complainants seek this clarification both to determine the scope of the preliminary submission on an "alternative cost methodology" as set forth in the October 1st Order, and to reasonably negotiate with Respondent an appropriate procedural schedule taking the issues for clarification into account.

II. BACKGROUND

A. Cable Operators' Complaint

In early-mid 2000, Gulf Power sought to terminate its long-standing pole attachment contracts with Complainants and unilaterally impose new contracts with new pole rental rates of $38.06 per pole, more than 500 percent higher than the existing rates of between $5.00 and $6.20 per pole. Gulf Power was motivated by a decision in *Gulf Power Co. v. United States*[4] holding that mandatory pole attachment provisions in 47 U.S.C. § 224(f), added by the Telecommunications Act of 1996, constituted a "taking." Gulf Power hoped that by

[4] 187 F.3d 1324 (11th Cir. 1999).

recharacterizing Complainants' existing "voluntary" attachments as "mandatory" and terminating the existing contracts it would be entitled to a "just compensation rate" of $38.06 per pole.

On July 10, 2000, after failed attempts at negotiation, Complainants filed a pole attachment Complaint and Petition for Temporary Stay with the FCC's Cable Services Bureau challenging the new rates and potential removal of cable facilities. The Complainants argued that the new pole rates violated 47 U.S.C. § 224 and 47 C.F.R. §§ 1.1401-1.1418, and that there was no merit to Gulf Power's argument that the "just compensation" required by the Constitution entitled Gulf Power to a higher pole attachment rate than that calculated under the Cable Formula.

Gulf Power filed its Response on August 9, 2000, challenging the Cable Formula methodology for failing to provide just compensation for the taking of space on its poles. The Response claimed to derive its $38.06 rental rate from, *inter alia*: (1) use of a "depreciated replacement cost approach," (2) inclusion of Federal Energy Regulatory Commission ("FERC") accounts that had been consistently rejected by the Commission, and (3) its own unusable space and pole height figures that differed from the Commission's established presumptions.[5] The Response also proposed various approaches for determining fair market value, including the sales comparison, income capitalization, and depreciated replacement cost approaches.[6]

In their August 29, 2000 Reply, Complainants emphasized that just compensation is measured by the loss to the property owner and that the market value approach to calculating just compensation does not apply because there is no "market" for attachments to utility poles.

[5] Response at 40-42, 49-50.

[6] Response, 49-51; Wise Affid. 18-29.

Moreover, the "income approach" to valuation could not apply to limited licenses of portions of utility poles. Complainants also argued that Gulf Power had provided no persuasive evidence proving actual loss, nor had it supported its inclusion of consistently-rejected FERC accounts or its alternative average pole height and usable space figures.[7]

In the May 13, 2003 *Bureau Order*,[8] the Bureau held that Gulf Power failed to justify its $38.06 pole attachment rate and directed Gulf Power to permit cable operators to remain attached to its poles at their existing contract rates pending negotiation of new agreements and rates pursuant to the federal Cable Formula under Section 224.

The Bureau recognized that cable operators had met their burden of establishing a *prima facie* case, and that Gulf Power had failed to establish that it received less than its incremental costs in permitting cable operators' attachments. The Bureau relied on the full Commission's decision *Alabama Cable Telecommunications Ass'n v. Alabama Power* Co.,[9] in concluding that the Cable Formula, together with the payment of make-ready expenses,[10] affords more than just compensation regardless of whether the attachments were deemed "voluntary" or "mandatory." Consistent with the full Commission's *APCO Review Order*, the Bureau also rejected Gulf Power's replacement cost methodology and its attempts to include unrelated cost accounts and alternative pole heights in its calculation of rental rates.

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[7] In addition, on September 11, 2000, after the pleading cycle had closed, Gulf Power filed a Notice of Filing Supplemental Authority, which consisted of a Second Affidavit of Gulf Power's appraiser responding to Complainants' August 29th Reply. In response, on September 21, 2000, Complainants' filed their own Comments On Gulf Power's Notice of Filing Supplemental Authority.

[8] *Florida Cable Telecommunications Ass'n, Inc., et al. v. Gulf Power Co.*, 18 FCC Rcd. 9599 (rel. May 13, 2003) ("*Bureau Order*").

[9] 16 FCC Rcd. 12209 (2001) ("*APCO Review Order*").

[10] "Make-ready" is the term used to describe the "upfront" costs assessed by contract against attachers to cover the costs that are actually incurred by pole owners in accommodating and installing the facilities of an attaching party. *Id.* at ¶ 29.

After the Enforcement Bureau issued its ruling granting Complainants' complaint,[11] Gulf Power sought reconsideration[12] arguing, among other things, for the opportunity to submit additional evidence at a hearing to meet the standard set forth in the Eleventh Circuit's decision in *Alabama Power Co. v. FCC*.[13] On December 9, 2003, the Bureau neither granted nor denied the Petition, but instead ordered Gulf Power to submit a more detailed description of evidence that it would proffer to meet the test set forth in *Alabama Power v. FCC*.[14] On January 4, 2004, Gulf Power submitted its Description of Evidence Gulf Power Seeks To Present In Satisfaction of the Eleventh Circuit's Test, indicating that Gulf Power would attempt to introduce: (1) evidence of an unknown number of pole change-outs to accommodate new attachments of four telecommunications carriers over unspecified years (some for 1998-2002) along with evidence that some of these new telecom attachers pay an "unregulated rate" for pole space on some poles; (2) evidence of make-ready for twelve different cable operators (and their geographic overlap) that have paid for change-outs of unspecified poles over an unspecified period of time; (3) unspecified load studies and business plans addressing the potential impact of unforetold third-party attachments; (4) evidence depicting what crowded poles look like; and (5) unspecified "other" evidence that Gulf Power may later discover.[15] On February 6, 2004, Complainants responded, explaining in detail how Gulf Power's purported evidence was irrelevant, overbroad and ultimately failed to satisfy the *Alabama Power v. FCC* exception.

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[11] *Bureau Order* at ¶ 14.

[12] Gulf Power Company's Petition for Reconsideration and Request for Evidentiary Hearing, P.A. No. 00-004 (filed June 23, 2003). Complainants filed their Opposition to Gulf Power Company's Petition for Reconsideration and Request for Evidentiary Hearing ("Opposition") on July 25, 2003.

[13] *Alabama Power v. FCC* at 1370-71.

[14] *See* Letter from Lisa B. Griffin to Messrs. Campbell, Peterson and Seiver (Dec. 9, 2003).

[15] *See generally* Description of Evidence Gulf Power Seeks To Present In Satisfaction of the Eleventh Circuit's Test at 3-9 (filed Jan. 8, 2004) ("Gulf Power Description of Evidence").

B. The ACTA/Comcast Proceeding

Shortly before Complainants filed their Complaint in this proceeding, the Commission was considering a complaint filed by the Alabama Cable Telecommunications Association and its members against Alabama Power Company, which was based upon facts and arguments similar to those raised by Gulf Power. In fact, Alabama Power Company and Gulf Power set forth identical legal arguments concerning just compensation and even used the same expert witness appraiser. In the ACTA/Comcast complaint proceeding, the Bureau rejected Alabama Power's contention that the Cable Formula did not provide just compensation. It found that Alabama Power was fully compensated for any loss through the payment of make-ready or change-out costs associated with the attachments and the annual pole attachment rate, which allowed it to fully recover the costs associated with the space used for the attachment, as well as a return on capital.[16]

The full Commission affirmed the Bureau's order, holding that the pole attachment regulations provided constitutionally sufficient compensation because they enabled Alabama Power "to operate successfully, to maintain its financial integrity, to attract capital, and to compensate its investors for the risks assumed . . . ."[17] The Commission ruled that Alabama Power had not provided credible evidence that the payment of make-ready and annual rents under the Cable Formula failed to place Alabama Power in the same position monetarily as it would have been but for the cable operators' attachments.[18]

On appeal to the Eleventh Circuit, the appeals court agreed with the Commission's application of the established legal principle that just compensation is measured by the loss to the

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[16] *See In re Alabama Cable Telecommunications Ass'n., et al. v. Alabama Power Co.*, 15 FCC Rcd. 17346 (2000).

[17] *APCO Review Order*, ¶ 51 (citations omitted).

[18] *Id.*, ¶ 58.

owner and held that, because FCC regulations provide for owners to be paid both their marginal costs through make-ready payments as well as their fully allocated costs through annual pole rents, Alabama Power received more than just compensation. The Court observed that only if Alabama Power had established facts showing actual lost opportunity, *i.e.*, that its poles were "full," would Alabama Power be able to demand compensation exceeding marginal cost.[19] Specifically, the Court held:

> In short, before a power company can seek compensation above marginal cost, it must show with regard to each pole that (1) the pole is at full capacity and (2) either (a) another buyer of the space is waiting in the wings or (b) the power company is able to put the space to a higher-valued use with its own operations. Without such proof, any implementation of the Cable Rate (which provides for much more than marginal cost) necessarily provides just compensation. While this analysis may create what appears to be an anomaly – a power company whose poles are not "full" can charge only the regulated rate (so long as that rate is above marginal cost), but a power company whose poles are, in fact, full can seek just compensation – this result is in accordance with the economic reality that there is no "lost opportunity" foreclosed by the government unless the two factors are present.[20]

On April 4, 2003, Alabama Power petitioned the United States Supreme Court for certiorari to review the Eleventh Circuit's decision in *Alabama Power v. FCC*. On October 6, 2003, the Supreme Court denied certiorari, letting the Eleventh Circuit's ruling stand.

[19] *See Alabama Power v. FCC* at 1370-71.

[20] *Id.* (footnote omitted).

III. GULF POWER'S EVIDENTIARY BURDEN IN THIS HEARING MUST FOLLOW THE STANDARD ARTICULATED IN *ALABAMA POWER V. FCC* AND THE *HEARING DESIGNATION ORDER*

Gulf Power requested – and the Bureau has now granted[21] – a hearing to consider evidence Gulf Power seeks to submit in an attempt to satisfy the Eleventh Circuit's *Alabama Power v. FCC* standard describing the limited factual circumstances that would allow Gulf Power to seek compensation in excess of marginal cost. This evidence must be limited to that included in the "description" of the evidence Gulf Power proposed to submit, as the *Hearing Designation Order* concluded that Gulf Power "should be afforded the opportunity to present the evidence delineated in its Description of Evidence during a hearing before an Administrative Law Judge ("ALJ").[22] Moreover, using this evidence, Gulf Power must first establish that "specific poles"[23] are "full" before considering evidence of an alternative cost methodology that quantifies the compensation in excess of marginal cost that Gulf Power may claim.

A. The *Alabama Power v. FCC* Standard And The Bureau's Issue For Adjudication Involve A Two-Part Evidentiary Hearing

Complainants respectfully submit that the *Prehearing Order* does not state the full scope of the evidentiary hearing that must be conducted to consider Gulf Power's request for compensation above marginal costs. By mentioning only an alternative cost methodology that Gulf Power may proffer, the October 1, 2004 *Prehearing Order* overlooks Gulf Power's initial burden of proof that falls within the ambit of this proceeding.

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[21] Prior to granting Gulf Power's request for an evidentiary hearing, the Bureau ordered additional proceedings concerning the types of evidence Gulf Power would proffer in a hearing and deferred ruling on the merits of the Petition for Reconsideration. *See* Letter from Lisa B. Griffin to Messrs. Campbell, Peterson and Seiver at 1 (Dec. 9, 2003). During the pendency of the Petition for Reconsideration, however, the Bureau has designated itself a party to the hearing, stating that it "will determine its level of participation, as appropriate." *Hearing Designation Order* at ¶ 9. Complainants seek clarification regarding the procedural posture of the case and the impact of the Bureau's participation as a party in the proceeding while its ruling on the Petition for Reconsideration remains pending.

[22] *Hearing Designation Order* at ¶ 5.

[23] *Id.*, ¶ 8.

The *Prehearing Order* states that Gulf Power has requested "a full evidentiary hearing to prove that 'an alternative cost methodology' should be applied – and not the 'Cable Formula' – in deciding an appropriate pole attachment rate in this particular case."[24] Further, the *Prehearing Order* sets November 5, 2004 as the deadline by which "Complainants and [Gulf Power] shall submit Preliminary Statements on Alternative Cost Methodology."[25]

While the amount of compensation Gulf Power seeks may ultimately be an issue in this hearing, that issue may only be considered after a determination that Gulf Power actually is entitled to more than marginal costs. As the *Prehearing Order* acknowledges, the issue designated by the Bureau for hearing is: "***Whether Gulf Power is entitled to receive compensation above marginal costs for any attachments to its poles belonging to the Cable Operators***, and, if so, the amount of any such compensation."[26] The Bureau determined this issue based upon Gulf Power's request for an opportunity to satisfy the standard set forth in *Alabama Power v. FCC*, which stated that:

> ... ***before a power company can seek compensation above marginal cost***, it must show with regard to ***each pole*** that (1) the pole is at full capacity and (2) either (a) another buyer of the space is waiting in the wings or (b) the power company is able to put the space to a higher-valued use with its own operations. Without such proof, any implementation of the Cable Rate (which provides for much more than marginal cost) necessarily provides just compensation.[27]

Because the Eleventh Circuit made this required showing a condition precedent to a utility's ability to seek additional compensation above marginal cost for any particular pole, a

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[24] *Prehearing Order* at 2.

[25] *Id.*

[26] *Hearing Designation Order* at ¶ 11 (emphasis added).

[27] *Bureau Order* at ¶ 15 (citing *Alabama Power Decision*, 311 F.3d at 1370-71) (emphasis added). *See also* Gulf Power Petition for Reconsideration and Request for Evidentiary Hearing at 4, 10-12 (filed June 23, 2003); *Hearing Designation Order* at ¶ 3.

hearing in satisfaction of this standard must necessarily meet both prongs of the standard – for each specific pole – before determining the appropriate rental above marginal costs.[28]

Gulf Power's own pleadings confirm this approach. Gulf Power, in its Request for Evidentiary Hearing[29] and Description of Evidence,[30] specifically requested the opportunity to submit evidence in an attempt to satisfy the *Alabama Power v. FCC* criteria. For example, Gulf Power's Petition for Reconsideration and Request for Evidentiary Hearing specified that it would submit evidence in an attempt to demonstrate that "(1) its poles are crowded or full; (2) there are other ready and willing buyers for space on Gulf Power's poles; (3) Gulf Power's pole space can be put to higher-valued uses; (4) Gulf Power has identifiable lost opportunities; and (5) there is an active willing buyer/willing seller market for network access on Gulf Power's poles."[31] Gulf Power's Description of Evidence was even more specific regarding the types of evidence and specific examples the utility would proffer if an evidentiary hearing were permitted.[32] Accordingly, even Gulf Power clearly recognizes that it must prove both prongs under *Alabama Power v. FCC* before it may attempt to quantify an amount above marginal costs which it claims would be necessary to provide "just compensation."

In light of the two-part standard outlined in *Alabama Power v. FCC* and supported by the Bureau's designated issue, Complainants respectfully request clarification that the evidentiary hearing first will address evidence to determine the specific poles on which Gulf Power may be entitled to more than marginal costs prior to determining, if necessary, whether an alternative cost methodology is appropriate for those poles.

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[28] The Bureau recognized that Gulf Power must first satisfy the *Alabama Power v. FCC* standard on each pole, stating that Gulf Power "bears the burden of proving it is entitled to compensation above marginal cost ***with respect to specific poles***." *Hearing Designation Order* at ¶ 8.

[29] *See* Gulf Power Petition for Reconsideration and Request for Evidentiary Hearing at 10-12.

[30] *See* Gulf Power Description of Evidence at 3-8.

[31] Gulf Power Petition for Reconsideration and Request for Evidentiary Hearing at 11.

[32] *See supra* at 6; Gulf Power Description of Evidence at 3-8.

B. No Alternative Cost Methodology Is Appropriate Where The Cable Formula And Payment Of Make-Ready Expenses Already Provide The Measure Of "Just Compensation" Exceeding Marginal Cost

Even if Gulf Power may be able to satisfy both prongs of the *Alabama Power v. FCC* test for any particular pole, Gulf Power must prove with regard to each such pole that the compensation it receives from pole rents and other make-ready expenses fail to provide "just compensation." Complainants seek to submit evidence that demonstrates that the compensation to which Gulf Power may be entitled on any particular pole is adequate under the Cable Formula when combined with Complainants' payment of make-ready expenses and thus satisfies the *Alabama Power v. FCC* test.

Both the Commission and the Eleventh Circuit ruled, consistent with more than 100 years of "takings" jurisprudence, that "just compensation is determined by the loss to the person whose property is taken."[33] As the Eleventh Circuit correctly observed, "'the question is, What has the owner lost? not, What has the taker gained?'"[34] The Eleventh Circuit held that the utility's monetary "loss" for purposes of determining the level of just compensation required by the Constitution is limited to its actual incremental, or marginal, costs, and the pole owner receives "much more than" this amount through the combination of make-ready and annual payments pursuant to the FCC's Cable Formula.[35]

In addition to the costs of providing access (make-ready), the Cable Formula provides for a pole rental based on all the costs associated with operating and maintaining the pole, costs of

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[33] *United States v. Causby*, 328 U.S. 256, 261 (1946). *See also Bauman v. Ross*, 167 U.S. 548,574 (1897).

[34] *Alabama Power v. FCC* at 1369 (quoting *United States v. Virginia Elec. & Power Co.*, 365 U.S. 624, 635 (1961) (citation omitted)).

[35] *Id.* at 1369-70.

the pole itself and a reasonable profit.[36] In fact, Section 224 creates a range of compensation, the low end of which is the incremental (marginal) costs of the utility that would not have been incurred but for the new attachment, and the high end of which is an allocation of the fully-loaded carrying costs of the pole (including return on investment).[37] The FCC has long interpreted the statute to provide that when it is reducing a utility's annual rate for pole attachments, it reduces it to the statutory maximum, the high end of the range of compensation.[38]

Accordingly, Complainants respectfully submit that any evidentiary hearing must consider the fact that Gulf Power already receives the appropriate measure of just compensation in excess of marginal cost through payment of make-ready expenses and annual rents under the Cable Formula.

IV. THE EVIDENCE AT THE HEARING SHOULD ALSO BE DIRECTED AT DEFINING AND APPLYING VAGUE AND AMBIGUOUS TERMS AND RESOLVING THE PARTIES' PRACTICES IMPACTING WHETHER PARTICULAR POLES ARE AT "FULL CAPACITY"

A determination regarding whether specific Gulf Power poles are at "full capacity," in satisfaction of the first *Alabama Power v. FCC* criterion, necessarily involves the definition and application of certain controversial, vague and ambiguous terms and practices that the Commission has yet to resolve in practice. Complainants and Gulf Power have starkly

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[36] "The Commission has concluded that its pole attachment formulas, together with the payment of make-ready expenses, provide compensation that *exceeds* just compensation." *Bureau Order*, ¶ 15 (citing *APCO Review Order*, ¶¶ 32-61) (emphasis added).

[37] 47 U.S.C. § 224(d).

[38] *FCC v. Florida Power Corp.*, 480 U.S. 245, 254 (1987). Indeed, in Gulf Power's earlier facial challenge to the constitutional sufficiency of Section 224, the Eleventh Circuit ruled that Section 224, as amended, effected a "taking," but noted that there was nothing to indicate that the compensation it received under "voluntary" access agreements was somehow inadequate under "mandatory" access. *Gulf Power Co. v. United States*, 187 F.3d 1324, 1338 (11th Cir. 1999) ("We have no reason to assume that the rate under the prior version of the Act was only minimally adequate to meet constitutional requirements for voluntary access, and thus, in the [utility's] view, constitutionally inadequate under the current Act for forced access situations. *Indeed, for all we know, it is just as likely that the earlier rate formula gave the utilities industry more than the constitutional minimum.*") (emphasis added).

contrasting views concerning the determination of when a pole is at "full capacity." The parties' divergent views include:

- Determination of "Insufficient Capacity:" Gulf Power asserts an "unqualified right to deny access for reasons related to capacity" in an attempt to satisfy the "full capacity" prong of the *Alabama Power v. FCC* standard.[39] But neither the text of Section 224(f)(2), nor the Eleventh Circuit decision in *Southern Co. v. FCC* construing utilities' access obligations under the statute, gives Gulf Power the right to unilaterally determine "insufficient capacity."[40] Rather, the Eleventh Circuit specified that utilities may not be required to expand the capacity of a pole only "*when it is agreed* that capacity is insufficient."[41] As a matter of law, Gulf Power may not declare insufficient capacity at its sole discretion or change the terms of those agreements unilaterally. Complainants seek a clarification that the hearing will include the submission of evidence regarding the parties' agreements that capacity is insufficient.
- Statutory Term "Insufficient Capacity" Is Ambiguous: The Eleventh Circuit affirmed the Commission's prior *Local Competition Reconsideration Order*,[42] rejecting utilities' arguments that 47 U.S.C. § 224(f)(2) entrusted them with "unfettered discretion" to determine "insufficient capacity."[43] The Court noted that this interpretation bears no support in the Pole Attachment Act, as amended by the

[39] Gulf Power Description of Evidence at ¶ 4.

[40] 47 U.S.C. § 224(f)(2); *Southern Co. v. FCC*, 293 F.3d 1338, 1347-49 (11th Cir. 2002).

[41] *Id.*, 293 F.3d at 1347 (11th Cir. 2002) (emphasis added). This agreement between the parties also is consistent with the nondiscrimination requirement underlying Section 224(f) and the terms of the parties' pole attachment agreements.

[42] *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Order on Reconsideration*, 14 FCC Rcd. 18049 (1999)(" Local Competition Reconsideration Order"), *aff'd Southern Co. v. FCC*, 293 F.3d 1338 (11th Cir. 2002).

[43] *Southern Co. v. FCC*, 293 F.3d at 1348.

Telecommunications Act of 1996 (the "Act")[44] and concluded that the term is "ambiguous."[45] Complainants seek clarification that the hearing will include the submission of evidence defining and applying the scope and parameters of the term "insufficient capacity."

- Definition of "Crowding" vs. "Full Capacity:" Gulf Power apparently seeks to satisfy some or all of the Eleventh Circuit's standard by showing "crowding," rather than "full capacity."[46] Although "crowding" is not defined by Gulf Power, the utility appears to contemplate that the term signifies something less than full pole capacity.[47] Indeed, Gulf Power seeks to argue that specific poles may have ample space for additional attachments, but nevertheless be "crowded" or at "full capacity" due to claims of weight and wind loading already stressing its poles. Complainants seek clarification that the hearing will include submission of evidence on these competing definitions in the pole attachment context.
- Reservation of Space / Bona Fide Development Plan: Gulf Power seeks to introduce evidence of individual load study reports and testimony "regarding the planning/economic impact of ***unforetold*** third-party attachments"[48] to support conclusory reservations of capacity in an attempt to meet the "full capacity" and

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[44] *Id.*

[45] *Id.* at 1348, 1349. The Court emphasized that the Act does not define the statutory term "insufficient capacity," does not describe the conditions that would indicate when capacity is insufficient, and explained that the statute "is silent on the scope and parameters of the term 'insufficient capacity....'" *Id.*

[46] *See generally* Gulf Power Description of Evidence.

[47] *See* Gulf Power Company's Reply to Complainants' Opposition to Petition for Reconsideration at 6-7 and n.4 (stating that one foot of remaining space on a pole for an additional attacher, after presuming attachments by electric, ILEC, CLEC and cable, was sufficient evidence of "crowding" to demonstrate lost opportunity under the *Alabama Power v. FCC* standard) (filed Aug. 13, 2003); Gulf Power Description of Evidence at n.4 (explaining that weight and wind loading on a pole may result in crowding on the pole) and ¶ 10 (suggesting generally that it intends to introduce testimony concerning pole "crowding" and the rivalrous attribute of pole space). However, the plain language of the Eleventh Circuit's test requires the utility to show "full capacity" on each pole, and nothing less. *Alabama Power v. FCC* at 1370.

[48] Gulf Power Description of Evidence at ¶ 8 (emphasis added).

"higher-valued use" standards set forth in *Alabama Power v. FCC*. Gulf Power may only reserve space, however, pursuant to a bona fide development plan "that reasonably and specifically projects a need for that space in the provision of its core utility service."[49] Notably, Gulf Power has provided no indication that it will introduce evidence concerning a bona fide development plan. Gulf Power also argues that it must be allowed to decide whether reserving pole space for a potential, future use has a higher value than hosting a communications attacher.[50] Under this approach, any and all poles would be deemed "at full capacity" due to Gulf Power's unfettered reservation of pole space for its future use, subjecting the poles to a utility-mandated "higher-valued use."[51] Complainants seek clarification that the hearing will include the submission of evidence on any specific and reasonable bona fide development plan, insofar as Gulf Power seeks to introduce evidence to satisfy the "full capacity" and "higher-valued use" prongs of the *Alabama Power v. FCC* standard.

- Pole Replacements / Change-outs: Gulf Power has argued that evidence of past, voluntary pole change-outs at requesting attachers' expense (*i.e.*, all marginal costs are paid by the attacher),[52] satisfies the Eleventh Circuit's test that poles were necessarily at "full capacity." However, this evidence merely shows past instances in which the parties agreed that pole capacity could be expanded and did so. The actual pole replacement creates surplus space that can be rented to others and enhances Gulf

[49] *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd. 15499 at ¶ 1169 (1996) (subsequent history omitted) (hereinafter "*Local Competition Order*").

[50] Gulf Power Description of Evidence at ¶ 8.

[51] *Alabama Power v. FCC* at 1370.

[52] *See* Complaint, Exhibits 3, 4 and 5 at ¶ 12; Supplement, Exhibit 5, ¶ 12 (Pole Attachment Agreements between Gulf Power and Complainants). *See also Alabama Power v. FCC* at 1368-69.

Power's distribution network,[53] precluding any claim of "lost opportunity" or rivalrous nature of the pole[54] and representing evidence of a net "gain." This is quite the opposite of a "lost opportunity." Gulf Power's evidence regarding past pole change-outs, without important information concerning the circumstances surrounding those change-outs, would transform this rate dispute (and all future rate disputes) into an *access* dispute.[55] Moreover, Section 224(i) prevents Gulf Power from charging existing attachers the costs of rearrangements or replacement of attachments if the modification "is required as a result of an additional attachment or the modification of an existing attachment *sought by any other entity*."[56] Complainants seek clarification that the hearing will include submission of evidence of voluntary pole change-outs as part of the determination that poles are not at "full capacity."

In sum, Complainants believe that this proceeding would benefit from clarification that an evidentiary hearing will include the submission of evidence that will: (1) define and interpret the ambiguous statutory term "insufficient capacity" and its parameters; (2) recognize that "insufficient capacity" exists only "when it is agreed" by the parties; (3) define and distinguish between "full capacity" and "crowding" on poles; (4) recognize the Commission's requirement for a reasonable and specific bona fide development plan for any reservation of space by Gulf Power; and (5) assess the relevance of past voluntary pole change-outs performed by Gulf Power.

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[53] *APCO Review Order* at ¶ 58 (2001) ("In instances where attachers pay the costs of a replacement pole, the attacher actually increases the utility's asset value and defers some of the costs of the physical plant the utility would otherwise be required to construct as part of its core service.").

[54] *Alabama Power v. FCC* at 1370.

[55] *See Local Competition Order* at ¶¶ 1161-64; *1999 Reconsideration Order* at ¶¶ 47-53 (1999).

[56] 47 U.S.C. § 224(i) (emphasis added).

CONCLUSION

Accordingly, for the foregoing reasons, Complainants respectfully request that the October 1, 2004 *Prehearing Order* and the scope of the evidentiary hearing in this matter be clarified as requested.

Respectfully submitted,

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October 20, 2004

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for Clarification has been served upon the following by telecopier and U.S. Mail on this the 20th day of October, 2004:

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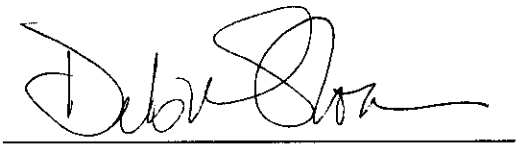

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